Reclaiming Homeowner Wealth: A Conversation with Barry, Fried, and Hatfield

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ABSTRACT: Homeowners in the United States pay residential real estate brokers commission rates that are about twice as high as the commission charges by brokers in comparable countries. Given the enormous size of the residential home sale market—both in aggregate terms and as a percentage of wealth owned by the average homeowner—this cost discrepancy results in U.S. homeowners transferring tens of billions of dollars each year to brokers that would be saved in a more competitive and fair market. In Et Tu, Agent? Commission-Based Steering in Residential Real Estate *("*Et Tu?*"), Jordan M. Barry, Will Fried, and John William Hatfield provide a superb study establishing the existence of steering by buyer brokers and explaining why this steering creates inflated costs in the U.S. market. This Response lauds the market analysis in* Et Tu?*, but argues that the solutions proposed by the authors fall short of what is needed to create a competitive and fairly priced residential real estate brokerage. This Response suggests focusing on public enforcement of existing standards-based antitrust, fiduciary duty, and "UDAP" laws. It concludes by identifying three models for public enforcement cases that might yield the necessary market reform—the big case, the catalyst state case, and the piranha method.*

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INTRODUCTION

In the United States, the vast majority of home buyers and home sellers use a real estate broker.[1] These buyers and sellers pay real estate brokers between 5% and 6% of the home sale price.[2] In contrast, homeowners in comparable nations pay a fraction of this amount.[3] The result is that U.S. real estate brokers drain billions of dollars in wealth from homeowners each year.

In *Et Tu, Agent? Commission-Based Steering in Residential Real Estate* ("*Et Tu?*"), Jordan M. Barry, Will Fried, and John William Hatfield present a groundbreaking empirical study of "steering" by American real estate brokers.[4] Brokers often steer home buyers to houses that will yield the broker the best payoff rather than acting in the interests of the home buyers they represent. This practice is possible because U.S. home sellers pay their brokers roughly a double commission for the sale of the home and then split that commission with the buyer's broker.[5] As the authors explain, avoiding

1. *See infra* note 22 and accompanying text.

2. *See infra* note 11 and accompanying text.

3. *See infra* Part I.A.

4. *See generally* Jordan M. Barry, Will Fried & John William Hatfield, *Et Tu, Agent? Commission-Based Steering in Residential Real Estate,* 110 IOWA L. REV. 1473 (2025) (studying steering in U.S. markets and its impacts on the economy).

5. This Response uses the term "broker" where *Et Tu?* employs the term "agent." The reason for this difference is that brokers are the entities that form a fiduciary relationship with the home buyer or seller. *See infra* notes 40–42 and accompanying text. This Response uses the

buyer brokers' steering their clients away from the seller's home is the only reason that a rational seller would "pay thousands of dollars to their counterparty's agent."[6]

The authors tap a unique set of data to produce a carefully constructed study proving that brokers steer home buyers.[7] They couple this data with ample anecdotal evidence that buyer brokers steer their customers away from properties that do not promise the standard payout to the buyer broker.[8] A compelling subpart of *Et Tu?* includes quotes from tape recordings made by REX Real Estate Exchange ("REX"), a new entrant to the real estate broker market with a business model that substantially lowered overall commission costs.[9] Buyer brokers inquiring about the availability of a home listed on REX were told that they would not be paid the customary split commission amount, but rather they should add the buyer broker fee to the bid price for the home. The recordings show responses by the buyer brokers including the following: "I'll tell [the buyer] that the property is sold"; "Are you kidding me? Forget it. Bye"; and "Yeah, I'm not going to even show it to them, to be honest with you. . . . There are a lot of properties out here . . . I'll just move on to the next one."[10]

The publication of *Et Tu?* should put to rest any argument about whether real estate brokers steer their clients. I find *Et Tu?* the most important piece of legal scholarship to date about the U.S. residential real estate brokerage industry. This Response seeks to further the discussion of residential real estate reform in two ways: (1) by offering a closer look at the enormity of the wealth transfer from homeowners to real estate brokers from the practices described by the authors; and (2) by sketching out options for a public enforcement approach to reforming the market.

Picking up on morsels dropped in *Et Tu?*, Part I of this Response looks at other data that allows for an estimate of the annual wealth transfer from homeowners to residential real estate brokers as a result of steering and inflated commissions. Even a minimalist approach to estimating this loss results in a disturbingly high number.

Part II argues that the superb empirical study and descriptive analysis in *Et Tu?* falters when it turns to solutions for reforming residential real estate brokerage. The authors propose a series of policy changes aimed at limiting

term "buyer broker" to mean the broker representing the buyer and the term "seller broker" to mean the broker representing the seller. The seller broker also is known as the "listing broker."

6. Barry et al., *supra* note 4, at 1563.

7. *See id.* at 1501–16 (describing the data that the authors used).

8. *Id.* at 1534–42.

9. *Id.* at 1540–42.

10. *Id.* at 1540–41. For the full recordings, see Andrea V. Brambila, *Listen: REX Releases Recordings of Agent Steering*, INMAN (Mar. 18, 2021), https://www.inman.com/2021/03/18/listen-rex-releases-recordings-of-agent-steering; and Audiotape: Houston Chronicle Call 1, at 3:00 (on file with the *Iowa Law Review Online*). *See also* MARK NADEL, CONSUMER POL'Y CTR., HOME BUYERS & SELLERS MAY SAVE $10,000 PLUS WITHOUT SACRIFICING HIGH QUALITY 14–18 (2026) (describing steering by real estate brokers).

improper steering of residential real estate buyers. The authors' proposal for legislative changes to fiduciary duty law is not useful, and perhaps even harmful. A likely rule-based attack on the problem suggested by the authors—prohibiting seller payment of buyer's commissions—offers a better solution, but it is more of a category of policy changes that should address possibilities for circumvention or negative outcomes. In any case, policy change by legislation or administrative rulemaking in this arena would require a political miracle, and *Et Tu?* does not tackle the big question of how this proposal would be put in place.

Part III builds the case that the likely solution lies in public enforcement of existing standards-based law; in particular, antitrust law, fiduciary duty law, and unfair and deceptive acts and practices ("UDAP") law. These laws provide all the tools needed to stop steering by, and collusion among, residential real estate brokers. This Part examines class action cases that have roiled the industry and raised public awareness of the problem and concludes that the actions of qualified, motivated public enforcers are the key to preventing egregious homeowner wealth drain by U.S. residential real estate brokers.

I. U.S. REAL ESTATE BROKERS DRAIN AN ENORMOUS AMOUNT OF HOMEOWNER WEALTH

The United States is an outlier in the amount that homeowners pay to transact a home sale. Studies of home sales in the United States show that total commissions range between 5% and 6%, with a rate of 5.4% commonly cited in more recent reports.[11] Buyer brokers typically receive about half, or slightly less, of the commission paid by the seller.[12] A 2024 study by the Federal Reserve Board found that average buyer broker commissions were about 2.7%, which is consistent with other recently produced data and with the buyer broker and seller broker splitting a 5.4% commission.[13] Section A

11. *See, e.g.*, Steve Nicastro, *Average Real Estate Agent Commission Rates (2026 Survey)*, CLEVER (Mar. 1 2026), https://listwithclever.com/average-real-estate-commission-rate/#calculator [https://perma.cc/ER3K-QVV2] ("The current average real estate commission in the U.S. is approximately 5.70%, divided between the listing agent (2.88%) and the buyer's agent (2.82%)."); Jefferson Duarte & David Zhang, Measuring the Impact of the NAR Settlement 1 (June 3, 2025) (unpublished manuscript) (on file with the *Iowa Law Review Online*) (stating that "U.S. real estate commissions have shown little decline, dropping only modestly from about 6.1% in 1991 to roughly 5.3% by 2015" and observing that "the literature has long documented the minimal deviation from the 5–6% norm across agents.") (citations omitted).

12. Nicastro, *supra* note 11; STEPHEN BROBECK & WENDY GILCH, CONSUMER POL'Y CTR., THE HOMEBUYER EXPERIENCE: COMMISSIONS AND CONTRACTS 5 (2025) (finding 95% of 269 surveyed real estate agents charge a buyer broker commission rate between 2.5% and 3.0%).

13. Rupkatha Banerjee & Andrew Paciorek, *Commissions and Omissions: Trends in Real Estate Broker Compensation,* BD. GOVERNORS FED. RSRV. SYS. (May 12, 2025), https://www.federalreserve.gov/econres/notes/feds-notes/commissions-and-omissions-trends-in-real-estate-broker-compensation-20250512.html [https://perma.cc/A8LW-BMTV]. This 2.7% average buyer share of the commission in the United States is consistent with the finding reported in *Et Tu?* based on data the authors obtained from Redfin. Barry et al., *supra* note 4, at 1505–09. Also consistent with these reports is that home seller class members in *Moehrl v. Nat'l Ass'n of Realtors* paid an average of 2.78% to buyer brokers. Expert Class Certification Report of

explains how these commission rates translate into enormous losses for American homeowners.[14] Section B looks at why these losses should matter for the discussion of public policy reforms in real estate.

A. The Enormous Wealth Drain From American Homeowners

The cost of real estate brokerage services in comparable countries is much less. A 2002 study by Natalya Delcoure and Norm G. Miller concludes that "US residential brokerage fees should equal something closer to 3.0% versus the common 6% or 7% fee [in the United States]" and that "fees in the US seem to be artificially high based on price rigidity within the US system."[15]

Nicholas Economides, a Professor of Economics at the NYU Stern School of Business, provided a more illuminating expert affidavit in 2022 in *Moehrl v. National Association of Realtors*, the initial case in the recent wave of class action litigation challenging the industry's steering and commission-splitting practices.[16] Economides conducted an extensive analysis of three national markets—the United Kingdom, the Netherlands, and Australia—that he determined are the best comparators to the U.S. residential real estate market.[17] In certifying the class in *Moehrl*, Judge Andrea R. Wood noted that an internal report by the defendant National Association of Realtors ("NAR") cites these same countries as comparator nations, and Judge Wood quoted a NAR report stating that brokers "'fear . . . a realignment of fees as charged in other countries in the world.'"[18]

The Economides affidavit identified multiple sources of data in each of the three comparator nations to draw two types of conclusions relevant here. First, few buyers use buyer brokers in these countries. Estimated use of buyer brokers was 1% to 5% in Australia and the same or less in the United Kingdom, and between 17% and 23% in the Netherlands.[19] Second, when buyers used a broker in these countries, they were paid much less than the

Dr. Nicholas Economides ¶ 93, Moehrl v. Nat'l Ass'n of Realtors, No. 19-cv-01610, 2023 WL 2683199 (N.D. Ill. Mar. 29, 2023) [hereinafter Economides Report] (on file with the *Iowa Law Review Online*). The Economides Report in the public record in the *Moehrl* litigation contains minor redactions.

14. This short Response does not delve into the complicated question of the division of loss between the buyer and the seller. Either way, a homeowner loses money, either the future homeowner (the buyer) or the past homeowner (the seller).

15. Natalya Delcoure & Norm G. Miller, *International Residential Real Estate Brokerage Fees and Implications for the US Brokerage Industry*, 5 INT'L REAL EST. REV. 12, 29 (2002); *see* Barry et al., *supra* note 4, at 1476–77, 1495 (explaining the oddities of the commission rates in the United States).

16. Economides Report, *supra* note 13. The author's wife is a member of the class counsel in the *Moehrl* case. The author also assisted another member of the *Moehrl* class counsel, Doug Miller, in originating the idea for the case. *See* Laura Kusisto, *The Minnesota Attorney Behind the New Rules Roiling Real Estate*, WALL ST. J. (Mar. 22, 2024, at 21:00 ET), https://www.wsj.com/us-news/the-minnesota-attorney-behind-the-new-rules-roiling-real-estate-5e84e18b (detailing the author's role in devising the case) (on file with the *Iowa Law Review Online*).

17. Economides Report, *supra* note 13, ¶ 9.

18. *Moehrl*, 2023 WL 2683199, at *9.

19. Economides Report, *supra* note 13, ¶¶ 34, 38, 42.

average compensation of U.S. buyer brokers. Economides used estimates at the high end of buyer broker fees to conclude that the average rates were no more than 1.9% in Australia, 1.6% in the United Kingdom, and 1.1% in the Netherlands, which produced an average across the three countries of no more than 1.55%.[20]

One can roughly estimate the amounts that American homeowners lose under the current system of steering coupled with split commissions by using the comparator data developed by Economides in relation to the dollar volume of residential housing sales. U.S. residential real property annual sales are estimated at $2.19 trillion for 2024 based on mean sales prices.[21] About 90% of home sellers and 88% of home buyers use a real estate broker.[22] Assuming no variance correlated to home value in the percentage of broker use, about $1.97 trillion in home value was sold using a seller broker and about $1.92 trillion in home value was purchased using a buyer broker. Using these amounts for the size of the residential real estate broker market, below are estimates of the amounts transferred from homeowners to real estate brokers in U.S. residential home sales relative to the three comparator nations in Economides's study.

> ***Buyer-Low: ~$22.0 billion per year***. The minimum wealth transfer to U.S. real estate brokers is the difference between the commission cost for buyer agents in comparator countries versus the United States. Subtracting the 2.7% buyer broker rate in the United States and the 1.55% average rate in the comparator nations yields a 1.15% difference. With $1.92 trillion in annual home sales through a buyer broker, if U.S. buyer brokers charged the commission rate in

20. *Id.* ¶ 91 (Table 4).

21. *See Existing-Home Sales Overview*, NAT'L ASS'N REALTORS, https://www.nar.realtor/sites/default/files/2025-08/ehs-07-2025-overview-2025-08-21.pdf [https://perma.cc/5HUK-JCS4] (showing a total unit sales figure of 4,060,000 for 2024); *Mean Sales Price of Existing Homes*, NAT'L ASS'N REALTORS (July 23, 2025), https://www.nar.realtor/sites/default/files/2025-07/ehs-06-2025-average-price-2025-07-23.pdf [https://perma.cc/KW9P-48YC] (showing average home sale price of $540,700 for 2024). Multiplying these numbers yields total sales of existing homes of $2.19 trillion. The median sale price in 2024 was $407,600. *Existing-Home Sales Overview*, *supra* note 21.

22. *NAR 2025 Profile of Home Buyers, Sellers Reveals Market Extremes*, NAT'L ASS'N REALTORS (Nov. 4, 2025), https://www.nar.realtor/magazine/real-estate-news/nar-2025-profile-of-home-buyers-sellers-reveals-market-extremes [https://perma.cc/EH4M-X3DD] (stating that 91% of sellers used a real estate broker). The 91% use of a broker by sellers was "all-time high . . . last seen in 2018" and was higher than the 90% use reported by NAR the previous year. *NAR Survey Finds that Percentage of Sellers Using an Agent Is at All-Time High*, RESPA NEWS (Nov. 3, 2025), https://www.respanews.com/rn/articlesrn/nar-survey-finds-that-percentage-of-sellers-using-95872.aspx [https://perma.cc/U2PN-5379]. Given that the data here is a rough, conservative estimate, the remainder of this Part employs 90% as the estimate of sellers engaging a broker. *Compare* Steve Mollman, *Americans Pay $100 Billion in Real Estate Commissions but Get Ready for a 30% Cut on That, Expert Says*, YAHOO! FIN. (Nov. 4, 2023), https://finance.yahoo.com/news/americans-pay-100-billion-real-163404746.html [https://perma.cc/ZV3X-RBPG]. The U.S Bureau of Economic Analysis estimated total ownership transfer costs for residential real estate at $170 billion in 2024. Banerjee & Paciorek, *supra* note 13.

comparator nations, U.S. homeowners would pay about $22.0 billion less to buyer brokers each year.[23]

Buyer-High: ~$48.4 billion per year. But home buyers in other nations do not typically use buyer brokers. As the authors of *Et Tu?* observe, the United States' use of buyer brokers has remained high even "as the commissions of other intermediaries, such as stockbrokers and travel agents, have plummeted" with internet use.[24] Even assuming the highest percentage use estimate of 5% in the United Kingdom and Australia, and taking Economides midpoint estimate of 20% in the Netherlands, the average buyer broker-use rate in the comparator nations is about 10%. If U.S. home buyers employed a buyer broker at the same rate as comparator nations, 78% of all home buyers would pay no buyer broker commission, resulting in a collective savings of 2.7% for these buyers of $46.1 billion from the $2.19 trillion in annual residential home sales. In addition, the 10% who would continue to employ a buyer broker would obtain the 1.15% commission rate savings, resulting in total buyer broker commission savings of $48.4 billion in savings.[25] Of course, some buyers will seek other professional help to replace the services of a buyer broker, which would reduce this estimated wealth transfer amount.[26]

Seller: ~$19.7 billion per year. Add the seller side commission differences and the excess payments to real estate brokers goes higher. Economides reports seller commissions estimated as follows: about 1.5% at most in the Netherlands and the United Kingdom,

23. This is the damages model Economides used based on "conservative assumptions" to derive estimated damages for the *Moehrl* class. *See* Economides Report, *supra* note 13, ¶¶ 9, 85 (explaining the conservative assumptions). Adapting this model to nationwide application, the total of U.S. home sales through a seller broker is 90% of the $2.19 trillion in annual sales, *see supra* note 22, or $1.92 trillion. If this $1.92 trillion in home sales was through a buyer broker at 1.15% less than the current buyer broker commission rate, savings would be $1.92 trillion * 1.15% = $22.08 billion.

24. Barry et al., *supra* note 4, at 1477.

25. To recap the math here, the $46.1 billion is derived from the elimination of a 2.7% commission on 78% of the $2.19 billion in residential real estate sales annually, or $2.19 trillion * 78% * 2.7% = $64.12 billion. The savings of $2.5 billion is derived from the 10% of U.S. homeowners who would continue to use a buyer broker but a cost of 1.15% less than the current 2.7% U.S. rate, or $2.19 trillion * 10% * 1.15% = $2.52 billion. The 12% of U.S. homeowners who do not use a real estate in either scenario have no impact on the calculations.

26. *See* Melissa Stewart, *Buyer Beware: Who Is Paying the Home Buyer's Real Estate Agent?*, 30 U. MIA. BUS. L. REV. 73, 96–97 (2021) (discussing the increasing role of internet marketing platforms to connect buyers and sellers). A Minneapolis attorney involved in the origination of the *Moehrl* lawsuit, Doug Miller, *see supra* note 16, is an attorney who also operates as a real estate broker. His business model shows that a certified real estate attorney can provide buyer broker services at a cost substantially less than a buyer broker. ATTORNEYRE: REALTY REDONE BY ATTORNEYS, https://minneapolisrealestateattorney.com [https://perma.cc/XD85-MQRC] (Minneapolis law office that provides realty services) ("Lawyers Who Do Everything Realtors Do. And Provide Legal Advice. Over $4,500,000 Commissions Saved!").

and a range between 1.5% and 3% in Australia with almost all of the sources reporting the highest rates in Australia as 2.7% and the lower rates as under 2%. These data suggest that the comparator nations paid at least 1% less to seller brokers compared to the approximate 2.7% rate in the United States. With about 90% of residential home sales involving a seller broker, U.S. home sellers pay at least an estimated $14.8 billion per year to seller brokers compared to sellers in the comparator nations.[27]

Total: ~$41.7 billion to $68.1 billion per year. Adding together the buyer and seller comparative losses, U.S. homeowners each year pay roughly between $41.7 billion (buyer side low estimate plus seller savings) and $68.1 billion (buyer side high estimate plus seller savings) more than their peers in the three comparator nations. In other words, these are annual homeowner savings if the U.S. residential real estate market had a cost structure similar to the comparator nations.

Table 1 below presents the above estimates in table format.

Table 1: Estimated Commission Differences in Dollars: United States Versus Comparator Nation Averages
(Based on U.S. residential real property annual sales estimate of $2.19

Buyer Broker Commission: *Low Estimate*		
At U.S. 88% Usage & U.S. 2.7% Commission	**At U.S. 88% Usage & Comparator 1.15% Commission**	**Difference**
$51.8 billion	$29.8 billion	$22.0 billion

Buyer Broker Commission: *High Estimate*		
At U.S. 88% Usage & US 2.7% Commission	**At Comparator 10% Usage & Comparator 1.15% Commission**	**Difference**
$51.8 billion	$3.4 billion	$48.4 billion

Seller Broker Commission Estimate		
At U.S. 90% Usage & U.S. 2.7% Commission	**At U.S. 90% Usage & Comparator 1.7% Commission**	**Difference**
$53.2 billion	$33.5 billion	$19.7 billion

27. The total of U.S. home sales through a seller broker is 90% of the $2.19 trillion in annual sales, *see supra* note 21, or $1.97 trillion. If this $1.97 trillion in home sales was through a seller broker at 1.0% less than the current buyer broker commission rate, savings would be $1.97 trillion * 1.0% = $19.7 billion.

These are rough estimates, obviously. They also do not account for the homeowner costs resulting from noncommission fees collected from buyers and sellers by real estate brokers, do not reflect higher third party costs attributable to real estate broker misconduct in a colluded market, and (most importantly) do not include interest costs that most home buyers will incur by rolling the cost of these transfers into their mortgage financing.[28] Even if the homeowner savings are half as large as these estimates, the loss is incredibly large, as described in the following Subpart.

B. The Scale of Homeowner Wealth Drain Deserves A Public Policy Response

The size of the wealth transfer here as a form of consumer money loss is hard to overstate. The amount is enormous because the asset category is enormous. The single largest source of wealth for most Americans is home ownership.[29]

Until its recent dismantling, the Consumer Financial Protection Bureau ("CFPB") was considered a gold standard for consumer protection enforcement by advocates.[30] The U.S. CFPB brought its first enforcement action in July 2012 and by January 2025—over twelve years later—it had recovered a total of $19.7 billion in "monetary compensation, principal reductions, canceled debts, and other consumer relief."[31] This amount of

28. *See, e.g.*, Jeanne Sager, *What Is a Transaction Fee and Who Pays It?*, REALTOR.COM (Aug. 18, 2022), https://www.realtor.com/advice/sell/what-is-a-compliancetransaction-fee-who-pays [https://perma.cc/65G9-UA99] (listing additional costs that brokers may charge); *Attorney General Ellison Reaches $3.5 Million Settlement with Edina Realty*, OFF. MINN. ATT'Y GEN. KEITH ELLISON (Nov. 19, 2024), https://www.ag.state.mn.us/Office/Communications/2024/11/19_EdinaRealty.asp [https://perma.cc/3CBU-NW87] (announcing settlement with Edina Realty based on illegally charging warranties to home buyers). Nor do these estimates include harder to gauge losses that result from transaction inefficiencies and burdens placed on homeowners as a result of these substantially higher transaction costs. *See* Barry et al., *supra* note 4, at 1484 (acknowledging the costs resulting from "Collaborative Industries"); *see also* Dan Kedmey, *Nearly 10 Million Mortgaged Homes Are Still Underwater*, TIME (May 20, 2014), https://time.com/105939/mortgage-underwater-negative-equity [https://perma.cc/8DS5-J7LP] (explaining the effect substantial brokerage fees can have on homeowners).

29. RAKESH KOCHHAR & MOHAMAD MOSLIMANI, PEW RSCH. CTR., WEALTH SURGED IN THE PANDEMIC, BUT DEBT ENDURES FOR POORER BLACK AND HISPANIC FAMILIES 23 (2023), https://www.pewresearch.org/wp-content/uploads/sites/20/2023/12/RE_2023.12.04_Race-Wealth_Report.pdf [https://perma.cc/KH9M-J6WV] (noting also that "Black and Hispanic homeowners typically derive a higher share of their wealth from owned homes than White and Asian households").

30. *See generally* Craig Cowie, *Creating Compliance Climates*, 75 U.C. L.J. 601 (2024) (contrasting CFPB enforcement under the first two Directors and describing the highly effective CFPB enforcement under the first Director); *Consumer Finance Monitor: The Impact of the Newly Established Priorities and Massive Proposed Reduction in Force (RIF) on CFPB Enforcement (Part 1)* (Spotify, June 12, 2025) (discussing the CFPB's enforcement success).

31. *The CFPB*, CONSUMER FIN. PROT. BUREAU (Dec. 3, 2024), https://www.consumerfinance.gov/about-us/the-bureau [https://perma.cc/3NHM-EJPU].

CFPB recoveries over twelve years is less than the above low estimate of $22.1 billion *per year* in excessive payments to buyer brokers alone.

A study of all UDAP public enforcement actions completed in 2014 by the CFPB, Federal Trade Commission ("FTC"), or any state attorney general, found $3.3 billion in consumer restitution.[32] Using the low-side estimate of $41.7 billion in homeowner loss for both buyers and sellers, reforming the U.S. buyer broker market to align with practices in comparator nations would result in annual consumer savings of more than twelve times the 2014 annual total of consumer protection recoveries from all federal and state UDAP enforcement actions.

This type of wealth transfer deserves a commensurate response from American policymakers, especially because steering and sharing of inflated commissions is illegal under existing U.S. law, as discussed in the following two Parts.

II. THE *ET TU?* POLICY PROPOSALS

Et Tu? does a remarkable job of combining a much-needed empirical study with a thorough analysis of the market dynamics that produce buyer broker steering, and seller broker manipulation of the fear of steering, to create a distorted market. The Article is less successful in proposing what to do about it. This Part looks at the specific policy proposals identified in *Et Tu?* and argues they do not advance useful and realistic solutions.

The authors of *Et Tu?* examine four policy changes to control steering by real estate brokers. The first proposal is to stop requiring seller brokers to pay a commission to buyer brokers.[33] The authors acknowledge that the settlement of the *Moehrl* case and a related class action (the "NAR Settlement") accomplished this task.[34] The second proposal is to make seller-paid commissions to buyer agents more visible to buyers.[35] The authors state that this change is unlikely to resolve steering and instead propose that "a more promising strategy" would be to reduce the visibility of such commission payments to other brokers.[36] Ultimately, the authors conclude this is unlikely to have a substantial impact and suggest the modest step of a public awareness effort regarding the negotiability of buyer agent fees.[37]

The other two policy proposals are more consequential. Section A looks at three changes to fiduciary duty law suggested by the authors that would

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There is an important difference between dollar amounts in consumer restitution paid in enforcement actions and estimated future savings from reforming a market. Nonetheless, the huge disparity between the restitution recovery and the possible benefit from a fairly priced market in real estate brokerage highlights the significance of the policy problem.

32. Prentiss Cox, Amy Widman & Mark Totten, *Strategies of Public UDAP Enforcement*, 55 HARV. J. LEGIS. 37, 70 (2018).

33. Barry et al., *supra* note 4, at 1563–64.

34. *See infra* notes 57–62 and accompanying text.

35. Barry et al., *supra* note 4, at 1564–68.

36. *Id.* at 1567.

37. *Id.* at 1568.

target the steering practices of buyer brokers.[38] Section B examines the main entrée on the menu of policy proposals in *Et Tu?*: the proposal to prohibit buyer brokers from accepting commission payments by sellers or their brokers.[39]

A. Existing Fiduciary Duty Law Does Not Need Amendment

Real estate brokers are fiduciaries under state common law.[40] The authors offer three legislative reforms to fiduciary duty law: (1) pass new laws expressly stating that steering violates a real estate broker's fiduciary duty; (2) pass a new law imposing statutory damages for steering; and (3) "make brokerages liable for steering conducted by their agents."[41] None of these proposals would be a useful change.

A new law prohibiting steering would accomplish nothing because steering a home buyer away from a house for self-interested reasons violates that broker's fiduciary duty to its principal, the home buyer, under current law. Fiduciary duties impose among the highest obligations in civil law, requiring the agent to:

> act in the utmost good faith, and solely for the benefit of the principal, even at the expense of the agent's own interest. Although an agent's interests are often concurrent with those of the principal, the general fiduciary principle requires that the agent subordinate the agent's interests to those of the principal and place the principal's interests first as to matters connected with the agency relationship.[42]

When a buyer broker engages in the sort of blatant steering shown in the REX tapes, or in the numerous other anecdotal descriptions of steering in *Et Tu?*, there is no question that such conduct violates the duty of loyalty. As the authors point out in the descriptive portion of *Et Tu?*, NAR used the argument that steering violates brokers' fiduciary duties as support for its position that steering in real estate is not commonplace.

38. *Id.* at 1562–71.

39. *Id.* at 1574–80.

40. *See, e.g.*, Bazal v. Rhines, 600 N.W.2d 327, 329 (Iowa Ct. App. 1999); Michel v. Moore & Associates, Inc., 67 Cal. Rptr. 3d 797, 802 (Cal. Ct. App. 2007) (discussing differences between statutory and common law fiduciary duty owed by real estate brokers). Many state statutes have recognized common law fiduciary duties owed by brokers. *See, e.g.*, IOWA CODE § 543B.56 (2025); CAL. CIV. CODE § 2079.24 (West 2025); MINN. STAT. § 82.67, subdiv. 3 (2025).

41. Barry et al., *supra* note 4, at 1570. The authors also suggest that "agencies" enforce fiduciary duty law as to steering. *Id.* at 1567–68. The authors' proposal that a government agency enforce fiduciary duty law mixes the issue of administrative enforcement with legislative policy change, but it is on the right track. As discussed in Part III, however, the critical question here is which government agency will enforce fiduciary duty violations. *See infra* Part III.

42. 19 WILLISTON ON CONTRACTS § 54:28 (4th ed.) (citations omitted).

The proposed legislative change might worsen the steering problem. A specific definition of steering put into a statute could be used to argue any variance from the definition is not steering. Creating rule-based consumer protections in place of laws of general application through legal standards can make courts hesitant to apply standards-based law that varies at all from the rule prohibition or at least can complicate the application of that law. This is a common problem in consumer protection law.[43]

The second proposal—to enact a minimum statutory damage amount for steering violations—also is more likely to hurt than help. The remedy for breach of the duty of loyalty is forfeiture of the entire fee paid to the agent. The Restatement of Agency (Third) makes clear that this is the appropriate remedy for the same reasons that the authors suggest a statutory damage:

> Forfeiture may be the only available remedy when it is difficult to prove that harm to a principal resulted from the agent's breach . . . Forfeiture may also have a valuable deterrent effect because its availability signals agents that some adverse consequence will follow a breach of fiduciary duty.[44]

The law of remedy for a breach of duty violation allows scaling fee forfeiture to the circumstances of the breach.[45] Even in the highly unlikely case that a state legislature enacted a statutory damage, it would probably offer less recovery than forfeiture of the entire commission as a remedy for breach of fiduciary duty.[46]

The final policy suggestion—to "make brokerages liable for steering conducted by their agents"—reflects a misunderstanding of fiduciary duty

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43. *See, e.g.*, Capito v. San Jose Healthcare Sys., 561 P.3d 380, 382–83 (Cal. 2024) (holding that a hospital had no duty to disclose its fees beyond the specific fees prescribed by statute); Prohias v. AstraZeneca Pharms., L.P., 958 So. 2d 1054, 1056 (Fla. Dist. Ct. App. 2007) (affirming motion to dismiss complaint alleging UDAP violation because the label at issue conformed to FDA standards); *see also* Lauren E. Willis, *Performance-Based Consumer Law*, 82 U. CHI. L. REV. 1309, 1311 (2015) (describing the ways in which some rules-based consumer protection laws are evaded).

44. RESTATEMENT (THIRD) OF AGENCY § 8.01, cmt. d(2) (AM. L. INST. 2006). The Restatement rejects conditioning fee forfeiture on either an offset for benefits generated by the agent or the principal's showing of damage causation. *Id.*

45. *Id.* at cmt. d(1). The Restatement comments provide that: "[t]he better rule permits the court to consider the specifics of the agent's work and the nature of the agent's breach of duty and to evaluate whether the agent's breach of fiduciary duty tainted all of the agent's work or was confined to discrete transactions for which the agent was entitled to apportioned compensation." *Id.* at cmt. d(2).

46. There are a vast range of statutory damages currently in effect. *See, e.g.*, 15 U.S.C. § 1692k (2024) ($1,000 for unfair debt collection practices violations); 15 U.S.C. § 1117(c) ($1,000 to $200,000 for using counterfeit trademark). Assuming that the statutory damage for steering would be $1,000—a potential dubious assumption—and using a buyer broker fee of 2.75%, the value of the house would only have to exceed $36,500 for the forfeiture to be greater than the statutory penalty.

law.[47] Brokers, not agents, are the direct fiduciary of their home buyer or home seller client.[48] This Response refers throughout to the relevant actor as the real estate broker rather than the real estate agent for this reason. Real estate agents owe fiduciary duties to home buyers and sellers, but only as subagents to their broker. Brokers are liable for the conduct of their agents under existing law.[49]

Fiduciary duty obligations are one of three types of existing law that provide standards-based authority to control steering. The problem to be solved is not how to change the law to prohibit or better punish steering but rather how to identify an actor who will enforce the already robust prohibitions on steering: a task taken up in Part III.

B. Prohibiting Seller Payments of Commissions Is a Category of Solution

The fourth and final proposal brings us to the heart of the matter. The authors suggest prohibiting buyer brokers from accepting payments from the seller or the seller's broker. A buyer broker cannot steer her client to a home with a seller-paid commission, or a higher seller-paid commission, if the seller or seller broker cannot pay a commission. This proposal gets the policy category right, but it doesn't provide a roadmap for a workable solution.

The first issue is what to do for buyers who decide they need a buyer broker but do not have the resources to pay for those services. The authors note this issue and point to the model used by REX, which is that "[b]uyers can simply add the negotiated commission on top of the offer price; the home purchase contract would then require the seller to pay the buyer agent this negotiated commission from the sale proceeds."[50] This works in the current environment where sellers pay the commission for both sides. If an enforceable rule prohibited sellers or seller's agents from paying buyer broker commissions, however, the REX practice would violate the prohibition.

The rule here could be loosened to allow for an exception at the request of the buyer. But in the highly "collaborative" business of real estate brokers, as the authors describe it, the exception likely would quickly swallow the rule.

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47. Barry et al., *supra* note 4, at 1570.

48. *See* 101 AM. JUR. TRIALS 1 *Real-Estate Broker's Breach of Fiduciary Duty to Disclose Material Facts to Seller-Principal* § 7 (2026) ("Because it is customary for a real estate broker to employ salespersons . . . the authority given to the broker by the listing agreement will generally include the implied authority to appoint these salespersons as subagents . . . .").

49. *Id.* (citing RESTATEMENT (SECOND) OF AGENCY § 406, cmt. b) ("An agent who employs a subagent is the latter's principal and is responsible . . . to his principal for the subagent's derelictions. Thus, the agent is subject to liability to the principal for harm to the principal's property or business caused by the subagent's negligence or other wrong to the principal's interest."). Real estate brokers are agents of their clients. *See generally id.* (discussing the obligations of a broker as an agent of their client).

50. Barry et al., *supra* note 4, at 1573. One of the authors of *Et Tu?* has written a detailed analysis of how this system works under current rules and practices. *See generally* Will Fried, A Simple and Effective Way for Homebuyers to Finance the Commission They Negotiate with Their Own Agents (Apr. 12, 2024) (unpublished manuscript) (on file with the *Iowa Law Review Online*).

Buyer brokers could tell their prospective clients that the seller will pay their commission if requested to do so, so nothing has changed. The seller brokers (who usually will be buyer brokers on other deals) will have an incentive to keep the current system by letting it be known their sellers will pay the buyer commission when requested.

The best alternative is probably a system where buyers typically go without brokers, as occurs in comparable nations.[51] A thorough study is warranted as to whether U.S. buyer brokers add value to home buyers compared to home sales in countries without regular use of buyer brokers.[52] Or the federal government-sponsored, secondary mortgage market entities could develop systems that allow easy packaging of buyer broker costs (up to a limit) in home financing. This would allow buyers to obtain financing that they could use to directly pay their broker. There are policy complications and difficult political lifts as to either of these options.

A second issue is how dual agency, which occurs in over 20% of residential real estate sales, interacts with the seller payment prohibition.[53] Dual agency allows a single broker to represent and collect a commission from both the buyer and the seller. Obviously, brokers have an incentive to double their commission on a sale. A 2018 study found evidence that some listing brokers engaged in practices that increased the likelihood of dual agency, and that dual agency reduces sales price.[54] The same study found that "hip-pocket listings," which is when a broker does not publicly list the property but rather shops it to select clients or others, increases the use of dual agency.[55] It would be difficult to enforce a prohibition on seller-paid commissions in dual agency deals. Payments by the seller to the broker representing both sides would appear as a payment by the seller to his broker. This detection problem would increase the already high incentive for the broker to engage in dual agency.

The above concerns are not offered to suggest a prohibition on seller-paid commissions is the wrong policy. It is the most direct means to attack the problem if the envisioned solution is the creation of a rule imposed on the industry. A prohibition on seller payment of buyer-side commissions is better described as a category of a rule-based policy solution. Part III examines the options for which actors might bring about such a policy or another form of resolution to the problem of real estate broker steering.

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51. *See supra* note 19 and accompanying text.

52. It seems likely that U.S. brokers do not add greater value commiserate with the much higher compensation rate than comparator nations given the vast number of U.S. real estate agents conducting very few transactions annually, *see infra* note 74.

53. Lingxiao Li & Bennie D. Waller, Causation of Dual Agency Transactions? Buyer Choices or Broker Manipulation: Theory and Evidence 1–2, 21 (Dec. 6, 2018) (unpublished manuscript) (on file with the *Iowa Law Review Online*).

54. *Id.* at 5–6, 21.

55. *Id.* at 20–21; *see* Demetres v. Zillow, Inc., No. 3:21-cv-00802, 2022 WL 4367597, at *1 (D. Conn. Sept. 21, 2022) (claiming that Zillow's platform increases the prevalence of dual agency transactions).

III. A PUBLIC ENFORCEMENT APPROACH TO ELIMINATING STEERING

A tighter policy proposal would help, but it would not address what has always been the biggest hurdle to reversing the real estate broker wealth drain, which is who is going to enact, promulgate, litigate for, order, or implement such a policy. Put another way, the central roadblock in reversing the homeowner wealth drain from steering is the lack of a motivated entity with the resources and authority needed to impose and implement a solution.

There are essentially three types of actors that could impose a solution: a legislature (Congress or a state legislature), a regulator with appropriate administrative rulemaking authority, or a court in a class action or public enforcement case; the familiar troika in our government separation of powers. The shape of a prohibition will look different in each of these situations because the legal authority (and political pressures) varies between legislatures, rulemaking regulators, and a court acting at the behest of either a private or public litigant.

Section A explains why new laws or administrative rules are unnecessary because existing standards-based legal authority contain all the authority needed to resolve the issue. Section B briefly argues that the legislation or rulemaking is unlikely to occur.

Section C makes the case for public enforcement as the best and probably only viable option for eliminating steering. It discusses the unrealistic expectations placed on the recent class action settlements. This Section then identifies three possible enforcement strategies. The knock-out punch is possible with the "big case," likely grounded in an antitrust claim, that achieves a court order prohibiting seller-paid commissions, or the like. A second option is the "catalyst state" approach in which a single state reforms its residential real estate brokerage market, thereby serving as the proverbial laboratory of reform. Finally, an organic solution could happen from a series of smaller public enforcement cases, perhaps along with private litigation, that raise the cost of collusion enough to discourage its use and allow new market entrants to gain footing. I call this the "piranha model."

A. EXISTING LAW PROHIBITS STEERING

Residential real estate steering is illegal. Three standards-based laws prohibit buyer brokers from steering their home buyer clients: antitrust law, fiduciary duty law, and UDAP law. Section II.A explained why fiduciary duty law—a creature primarily of state law in this context—is a near perfect fit for tackling the problem of steering, and why legislative changes are not needed. This Part will focus on antitrust and UDAP law. There is a statutory regime for these claims in federal law and in every state.[56]

56. *See, e.g.*, 15 U.S.C. §§ 1–38 (antitrust); MINN. STAT. § 325D.44 (2025) (UDAP); IOWA CODE § 714D.3 (2025) (UDAP).

1. Antirust Law

We have recently witnessed a powerful example of why steering is illegal under antitrust law. The *Moehrl v. National Association of Realtors* lawsuit filed in the U.S. District Court for the Northern District of Illinois in 2019 alleged that NAR and some of the largest real estate brokers in the United States violated antitrust law by using steering to inflate real estate commission in multiple states.[57] The putative class was represented by three of the largest plaintiff class law firms in the United States.[58] The Economides expert affidavit discussed in Part I of this Response was filed in that lawsuit.[59] The court rejected the defendants' motion to dismiss and then certified the class.[60]

A copycat suit, *Burnett/Sitzer v. National Association of Realtors*, was later filed in the U.S. District Court for the Western District of Missouri, alleging antitrust violations from steering on behalf of homeowners in Missouri, and it also survived dispositive motions, and the class was certified.[61] This less geographically expansive, Missouri-only lawsuit proceeded to trial. A jury found for the plaintiff class after less than three hours of deliberations and returned a $1.78 billion verdict for the class.[62] These suits [hereinafter, the "*Moehrl* lawsuits"] were later jointly settled in the NAR settlement.[63] There is no question, therefore, that residential real estate steering combined with commission splitting at high costs can be successfully challenged under antitrust law.

The focus of this Response is on stopping the wealth drain in residential real estate by combatting steering, but it is worth noting that antitrust law also can be used to remediate the practices that lock out new market entrants. Patterns of disintermediation following internet use should have disrupted this industry, as it has in other similarly situated markets. The arguably single most important function of a buyer broker pre-internet was to give buyers access to the paper inventory of houses for sale: a function that has all but

57. Complaint ¶ 1, Moehrl v. Nat'l Ass'n of Realtors, 2019 WL 1058205 (N.D. Ill. Mar. 6, 2019) (No. 1:19-cv-01610). To reiterate, the author has a personal connection with this case. *See supra* note 16.

58. Order at 1, Moehrl v. Nat'l Ass'n of Realtors, 2019 WL 1058205 (N.D. Ill. May 30, 2020) (No. 1:19-cv-01610), Dkt. No. 171 (Those firms are Cohen Milstein Sellers & Toll PLLC, Hagens Berman Sobol Shapiro LLP, and Susman Godfrey LLP.).

59. *See supra* Section I.A.

60. Moehrl v. Nat'l Ass'n of Realtors, 492 F. Supp. 3d 768, 787 (N.D. Ill. 2020); Moehrl v. Nat'l Ass'n of Realtors, No. 19-cv-01610, 2023 WL 2683199, at *24 (N.D. Ill. Mar. 29, 2023).

61. *See generally* Complaint, Sitzer v. Nat'l Ass'n of Realtors, 420 F. Supp. 3d 903 (W.D. Mo. 2019) (No. 4:19-cv-00332), 2019 WL 13107131 (stating claims of plaintiffs); Sitzer v. Nat'l Ass'n of Realtors, 420 F. Supp. 3d 903, 918–19 (W.D. Mo. 2019) (holding that sellers alleged plausible facts to state their claim); Burnett v. Nat'l Ass'n of Realtors, No. 19-cv-00332, 2022 WL 1203100 (W.D. Mo. Apr. 22, 2022) (granting class certification).

62. Dave Gallagher & Austin Alonzo, *Jury Sides with Home Sellers in Commissions Trial*, REAL EST. NEWS (Oct. 31, 2023), https://www.realestatenews.com/2023/10/31/jury-sides-with-home-sellers-in-commissions-trial [https://perma.cc/V2UZ-6EUJ]; Verdict Form at 2, Sitzer v. Nat'l Ass'n of Realtors, No. 4:19-cv-00332 (W.D. Mo. Oct. 31, 2023), Dkt. No. 1294.

63. *See supra* note 34 and accompanying text.

disappeared with the internet listing of available properties.[64] New internet-based market entrants have opened the gate to much lower buyer broker costs, but the residential real estate brokerage industry has managed to isolate and destroy, or neuter, these efforts.[65] Nonetheless, this second, and sometimes intertwined, threat of antitrust suits by thwarted new market entrants presents another opportunity for attacking the wealth drain.

2. UDAP Law

UDAP laws offer a useful, if less precisely targeted, legal authority to control steering. UDAP claims can arise from the representations, or omissions, in the discussions between brokers and home buyers or home sellers. The statements by buyer brokers talking to REX agents quoted in the Introduction, such as the buyer broker's agent proclaiming that she would lie to her client and tell them the property was sold, obviously violate UDAP law. The fact that these buyer brokers would make these statements after being informed the conversation was recorded offers an insight to the sense of invulnerability to consequence (or perhaps ignorance of the basics of UDAP and fiduciary duty law) among real estate brokers.[66]

Prior to the NAR settlement, brokers could truthfully, more or less, tell a seller that if they wanted to list their home on the multiple listing service ("MLS"), they had to offer payment of a buyer broker's commission. This codified system of collusion made the claims in the *Moehrl* lawsuits legally powerful and, ultimately, successful. After the NAR settlement, brokers are in a fraught situation. UDAP laws provide one of the reasons that brokers should be concerned about making representations or engaging in other practices with sellers that imply that they must pay a buyer broker commission. Consider a seller broker telling their client that they need to pay a 6% commission because buyer brokers won't show the house to their buyer clients if they are not offered 3%. A broker arguably violates UDAP law if it fails to mention that the alleged need to pay 3% to the counter-party's agent is a statement based on an assumption of widespread illegal conduct, as this type of steering is illegal.

Brokers previously told buyers that the broker worked for "free" under the MLS system of inflated and shared commissions. The NAR Code of Ethics expressly sanctioned this representation until 2022.[67] The NAR settlement

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64. William Zhang, *How Technology Replaced the Role of a Realtor*, DIYHOMEBUYER.COM (June 23, 2024), https://www.diyhomebuyer.com/how-technology-replaced-the-role-of-a-realtor [https://perma.cc/4HF7-BFQT].

65. Barry et al., *supra* note 4, at 1576–77.

66. *See supra* Section II.A.

67. *Compare* NAT'L ASS'N REALTORS, CODE OF ETHICS AND STANDARDS OF PRACTICE OF THE NATIONAL ASSOCIATION OF REALTORS (2021), https://d1u7daj727sadp.cloudfront.net/images/2021_NAR_CodeofEthics.pdf [https://perma.cc/K56V-QYXD] (Standard of Practice 12-1), *with* NAT'L ASS'N REALTORS, CODE OF ETHICS AND STANDARDS OF PRACTICE OF THE NATIONAL ASSOCIATION OF REALTORS (2022), https://rasminfo.com/wp-content/uploads/2022-NAR-Code-of-Ethics-1.pdf

requires the buyer broker to enter into a contract with the buyer that sets an "objectively ascertainable" fee that is not just what the seller is offering to pay the buyer broker.[68] This provision likely will not undo steering, for the reasons the authors suggest in *Et Tu?*, but it means that a buyer broker telling buyers it works for free is an actionable false or misleading statement. What about telling the buyer, "Don't worry, the seller will pay my commission" or "I only get paid if the seller pays me," or the like? Possible UDAP violations or NAR settlement violations lurk in any such statements.

UDAP can fill gaps in, or provide a vehicle for enforcement of, the other standards-based laws. A breach of fiduciary duty often constitutes a *per se* UDAP violation.[69] UDAP law provides remedies not available for a breach of fiduciary duty claim, including fee shifting and, in a public enforcement action, civil penalties.[70] UDAP is adaptable to cover specific practices that are deceptive or unfair when the conduct would not necessarily violate antitrust standards, or proof of such violations would be burdensome to undertake.

B. Legislation And Regulatory Rulemaking Are Unlikely To Resolve Steering

Enforcing existing standards-based laws through litigation provides flexibility in devising injunctive remedies and the potential to adapt compliance to shifting conduct by defendants subject to an injunction. An alternative implicitly suggested by the authors is codifying a rule-based solution to steering through legislation or rulemaking, but this is unlikely to happen.

Regulation of residential real estate brokerage is primarily a function of state law. The federal Real Estate Settlement Procedures Act ("RESPA") prohibits kickbacks to or from real estate agents, but otherwise the states license real estate agents and brokers and supervise their conduct.[71] State legislatures enact laws regulating residential real estate brokers, but they often are laws that benefit real estate brokers at the expense of homeowners rather than the other way around. For example, ten states have enacted laws that prevent brokers from providing commission rebates to their clients: a brazen

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[https://perma.cc/8UNL-W2CS] (Standard of Practice 12-1).

68. *See* NAR Settlement, *supra* note 34, ¶ 58(vi)(b) and accompanying text.

69. *See, e.g.*, *In re* Meyer, 379 B.R. 529, 558 (E.D. Penn. 2007) (holding that violation of Truth in Lending Act was per se violation of UDAP law); FED. DEPOSIT INS. CORP., CONSUMER COMPLIANCE EXAMINATION MANUAL, at ch. VII-1 (2022), https://www.fdic.gov/consumer-compliance-examination-manual/vii-1-federal-trade-commission-act-section-5-and-dodd-frank [https://perma.cc/9UCR-LEBS] (discussing the relationship of UDAP and fiduciary duties).

70. *See Consumer Protection Laws: 50-State Survey*, JUSTIA (Oct. 2023), https://www.justia.com/consumer/consumer-protection-laws-50-state-survey [https://perma.cc/LRU4-QW8U] (discussing state UDAP laws with fee shifting); *see also* ERIC N. HOLMES, CONG. RSCH. SERV., IF12244, UNFAIR OR DECEPTIVE ACTS OR PRACTICES (UDAP) ENFORCEMENT AUTHORITY UNDER THE FEDERAL TRADE COMMISSION ACT (2022), https://www.congress.gov/crs-product/IF12244 [https://perma.cc/X2BD-F55G] (discussing public enforcement).

71. 12 U.S.C. § 2607; 12 C.J.S. *Brokers* § 14 (2026).

codification of the interests of real estate brokers at the expense of homeowners.[72] In Minnesota, a class action suit found that the practice of dual agency breached the fiduciary obligations of a real estate broker.[73] The legislature promptly responded by creating a statutory authorization of the practice.[74]

The real estate brokerage industry is a powerful player in the world of campaign contributions, which may explain these outcomes, as *Et Tu?* suggests. Yet the power of the industry, especially at the state level, probably derives more from the vast number of people who are real estate agents. Approximately 1% of the working population in the United States are licensed real estate agents.[75] Unsurprisingly, comparator countries with lower commission rates have a much lower percentage of real estate agents; in the United Kingdom, for example, .12% of its working population are estate agents, or about one-eighth as many agents.[76] Because residential real estate

72. The authors of *Et Tu?* cite the 2007 DOJ report that found eleven states that banned rebates. Barry et al., *supra* note 4, at 1496, 1497 n.142. It appears that New Jersey and North Dakota no longer ban rebates, while Tennessee has since banned them. *States that Prohibit Realtor Fee Negotiations*, CONSUMER ADVOCS. AM. REAL EST., https://www.caare.org/statesthatprohibitfeenegotiations [https://perma.cc/N5P7-CPJ7].

73. *See* Dismuke v. Edina Realty, Inc., No. 92-8716, 1993 WL 327771, at *3 (D. Minn. June 17, 1993).

74. *See generally* MINN. STAT. §§ 82.55–.89 (2025) (detailing criterion by which dual agency may be utilized).

75. *See How Many Realtors in the US (by State in 2025)*, LEADSDEPOSIT, https://leadsdeposit.com/how-many-realtors-in-the-us [https://perma.cc/6WXQ-3RXY] ("[T]here are approximately 3 million real estate agents in the USA that hold licenses."). NAR states that in 2025 there were over 1.5 million real estate agents that were its members. Stacey Moncrieff, *Keeping Tabs on NAR Membership*, NAT'L ASS'N REALTORS (May 9, 2024), https://www.nar.realtor/magazine/real-estate-news/keeping-tabs-on-nar-membership [https://perma.cc/MVV9-CJEM] (reporting 1,509,195 Realtors/NAR members as of Apr. 30, 2025); *see* FED. RSRV. BANK ST. LOUIS, INFRA-ANNUAL LABOR STATISTICS: WORKING-AGE POPULATION TOTAL: FROM 15 TO 64 YEARS FOR UNITED STATES (Aug. 17, 2026, 15:06 CDT), https://fred.stlouisfed.org/series/LFWA64TTUSM647S [https://perma.cc/5WX8-LLE3] (showing an estimated U.S. working population of 212,352,300 as of September 2025). The three million, therefore, yields about 1.4% of the working age population as a real estate agent, while the NAR membership numbers yields about 0.7%, although NAR membership obviously omits all the non-member realtors. Whether the number of real estate agents is closer to two million or three million, it is an extraordinary overabundance. About four million existing homes are sold each year. *See supra* note 21. Therefore, the United States has between one and two real estate agents for every home sold, depending on the total number of real estate agents. *See generally* STEPHEN BROBECK, CONSUMER FED'N AM., A SURFEIT OF REAL ESTATE AGENTS (2023), https://consumerfed.org/wp-content/uploads/2023/07/Real-Estate-Agent-Report-7-10-23-1.pdf [https://perma.cc/B66N-XD85] (providing a summary of the real estate agent profile).

76. There are about 52,700 "estate agents" in the United Kingdom in a working population of about 43.4 million people. *See* D. Clark, *Estimated Number of Estate Agents and Auctioneers in the United Kingdom from 4th Quarter 2021 to 1st Quarter 2026*, STATISTA (July 28, 2026), https://www.statista.com/statistics/319823/number-of-estate-agents-and-auctioneers-in-the-uk [https://perma.cc/96ZV-NHZC]; FED. RSRV. BANK ST. LOUIS, INFRA-ANNUAL LABOR STATISTICS: WORKING-AGE POPULATION TOTAL: FROM 15 TO 64 YEARS FOR UNITED KINGDOM (Mar. 16, 2026,

exists wherever people reside, real estate agents are spread through every district in every state in the United States. It also does not help that most consumer advocacy organizations have almost no presence in the residential real estate space.[77] Waiting on state legislatures to pass comprehensive legislation aimed at drastically reducing overall real estate commissions is not a promising strategy.

The picture is no better with real estate licensing authorities. As noted in a section of *Et Tu?* prior to the discussion of policy implications, the real estate brokerage industry often controls such agencies, sometimes by legislative design.[78] There is almost no evidence that these regulators have attempted systematic enforcement or administrative rulemaking for the purposes of reducing commission levels of the brokers they regulate. The FTC arguably could undertake rule promulgation through its UDAP rulemaking authority. But the absence of FTC enforcement activity in this space, the traditional state control of real estate brokerage matters, and the current assault on administrative authority generally (and the FTC's authority in particular) make such an outcome almost inconceivable.[79]

C. *A Public Enforcement Agenda*

That leaves lawsuits under existing standards-based law. The amounts at issue in individual cases are rarely enough to motivate private attorneys to take the cases, and a few individual cases are pebbles against a brick wall. The realistic options are class actions, such as the *Moehrl* lawsuit, or public enforcement.[80] Subsection 1 argues that class actions likely are not the best vehicle to change the market patterns at issue here. Public enforcement, however, is well-suited to this task. Subsection 2 identifies three archetype options for a public enforcement agenda aimed at eliminating steering and protecting U.S. homeowner wealth.

3:16 PM) https://fred.stlouisfed.org/series/LFWA64TTGBQ647N [https://perma.cc/G2ZF-SBVN].

77. Notable exceptions to the lack of consumer advocacy work in this space are the research and publication work by Stephen Brobeck, of the Consumer Federation of America, and a small nonprofit founded by Doug Miller, CAARE. *Staff: Stephen Brobeck*, CONSUMER FED'N AM., https://consumerfed.org/expert/stephen-brobeck [https://perma.cc/F6BQ-ANM9]; *Congressional Testimony of Douglas R. Miller*, CONSUMER ADVOCS. AM. REAL EST., https://www.caare.org/congressionaltestimony [https://perma.cc/L4CS-JZVZ].

78. *See* Barry et al., *supra* note 4, at 1489.

79. *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S.Ct. 2244, 2272–73 (2024) (overruling a longstanding doctrine that granted interpretative deference to federal agencies); AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n, 141 S.Ct. 1341, 1352 (2021) (limiting the FTC's authority to obtain disgorgement damages).

80. *See* ADAM CROWTHER, PUB. CITIZEN, PRIVATE ACTIONS, PUBLIC BENEFITS 4 (2013), https://www.citizen.org/wp-content/uploads/private-litigation-public-enforcement-consumer-protection-report.pdf [https://perma.cc/WQ5Z-SL8R] (identifying the need for class actions and public enforcement).

1. The Unrealistic Expectations for Class Action Cases

The authors of *Et Tu?* and others argue that the injunctive relief in the NAR settlement did not resolve the problem of steering in residential real estate.[81] This seems accurate, and it is safe to say that steering is unlikely to disappear because of the NAR settlement. That the *Moehrl* lawsuits or any private class action suit would permanently resolve steering in residential real estate was an unrealistic expectation.

Class actions are fertile ground for ideological warfare in legal scholarship and in general public discourse.[82] No matter how one views this divide, the *Moehrl* suits were never going to result in substantial compensation to the members of the class because the damages from steering far exceed the assets of the defendants: very far exceed. The $1.78 billion award for only Missouri homeowners in *Burnett/Sitzer v. National Association of Realtors* suggests nationwide damages from steering for the period covered by that suit in the range of $100 billion.[83] Antitrust law allows for tripling damages, or roughly $300 billion.[84] The parties could either settle, with a focus on injunctive relief, or there would be a mass bankruptcy or liquidation of NAR and America's residential real estate brokers.

Accordingly, and predictably, the class and the defendants settled with a focus on the injunctive relief. Injunctive relief must be tailored to the circumstances of the alleged violation of antitrust law.[85] The circumstances pled and proved here were the use of the MLS, coordinated through NAR, to require commission splitting and facilitate steering in violation of antitrust law. The NAR settlement definitively resolved this problem.[86] The lawsuit did

81. *See* Barry et al., *supra* note 4, at 1563–68.

82. *See* Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 406–17 (2014) (identifying the "romantic" and "dark" class action narrative dichotomy).

83. Missouri has 1.8% of the U.S. population. *See Missouri*, DATAUSA, https://datausa.io/profile/geo/missouri [https://perma.cc/8WTW-6V4S] ("Missouri is home to a population of 6.19M people . . . ."); *US States – Ranking by Population 2026*, WORLD POPULATION REV., https://worldpopulationreview.com/states [https://perma.cc/X6YL-F69Q] ("The United States . . . with an estimated population of 347,276,000 people . . . ."). A nationwide damage would be 55.55 times greater than a Missouri-only class, or *98.9 billion ($1.78 billion * 55.55).

84. 15 U.S.C. § 15(a).

85. Owen Fiss, *The Law of Narrow Tailoring*, 23 U. PA. J. CONST. L. 879, 879 (2021) ("[The law of judicial remedies] requires that injunctions be confined to protecting against specific and clearly defined wrongs.").

86. The *Moehrl* lawsuits fundamentally changed the discussion about residential real estate sales, in the general public and within the profession. A bevy of reporting in the popular press followed the NAR settlement, many of which noted that home buyers and sellers were starting to challenge whether they need to pay such high commission rates. *See, e.g.*, Aly J. Yale, *How the NAR Settlement Is Changing Homebuying and Selling*, U.S. NEWS (Aug. 15, 2024, at 14:04), https://realestate.usnews.com/real-estate/articles/what-the-2-billion-realtor-lawsuit-means-for-homebuyers-and-sellers [https://perma.cc/5STY-ZGS5]; Megan Cerullo, *National Association of Realtors to Cut Commissions to Settle Lawsuits. Here's the Financial Impact.*, CBS NEWS (Aug. 16, 2024,

not prohibit all forms of commission splitting and expressly allows for offers of compensation to buyer brokers not on the MLS.[87]

In other words, the lawsuit did what a private class action can be expected to do: It resolved the alleged conspiracy but did not attempt to preclude all other imaginable forms of new conspiracies that might later arise. The class attorneys expect to get paid in the settlement for dismantling the then-existing collusive system in violation of antitrust law, and the industry was left to figure out how to respond to having been held liable for operating a collusive system.

It seems clear that the response of the residential real estate industry has been to adapt its business model to continue steering through offers of buyer broker commission off the MLS, such as on private websites or other forms of less easily discoverable communications.[88] Doing in private what was previously done in public does not make steering legal. The NAR settlement requirement that the buyer broker obtain an agreement with the buyer before conducting showings, including an objectively ascertainable commission amount, should help highlight the illegality of this response under all three standards-based legal regimes discussed above. Brokers that use standardized forms on both sides of the transaction that signal commission payments are not what they appear to be in the buyer broker agreement could support a finding that the brokers are recreating the steering and commission splitting scheme recently found to be illegal.

Therefore, a private class suit challenging the new and likely diffuse systems of commission-splitting seems feasible. However, a new class action lawsuit grounded in a new commission-splitting and steering system likely will lack the readily available proof of common and widespread conduct through the MLS that made the broad scope of the *Moehrl* lawsuits efficiently certifiable as a class action. More importantly, there is little reason to believe a single private lawsuit or a set of lawsuits in which the plaintiff's attorneys expect to get paid and the defendants intend to survive in business will reach a different result than the *Moehrl* lawsuits.

at 17:53 ET), https://www.cbsnews.com/news/realtor-commission-settlement-nar-national-association-realtors [https://perma.cc/TDG5-F6LU].

87. NAR Settlement, *supra* note 34, ¶ 58(xiii). *See* Nadel, *supra* note 10, at 2 (concluding that the class action settlement did not resolve problem and that "tacit price fixing continues, leaving commission rates little changed, despite the dramatic cost reductions that technology has created") (citations omitted). The Eighth Circuit recently affirmed the settlement. Burnett v. Nat'l Ass'n of Realtors, No. 24-3444, 2026 WL 2421806 (8th Cir. Aug. 19, 2026).

88. Andrea V. Brambila, *NAR Claims Settlement 'Eliminates' Steering — But Plaintiffs Problem Warning*, CAYS REALTY, https://www.cays.com/nar-claims-settlement-eliminates-steering-but-plaintiffs-problem-warning [https://perma.cc/5MX2-L4CN] ("[NAR's] trade team has in-depth approaches that listing brokers could advertise provides of compensation to customer brokers outdoors of the MLS . . . ."); Brobeck, *supra* note 12, at 2 ("[A] consensus has emerged that in the past two years average rates have changed little. Initially rates declined somewhat but more recently, have returned to the average level before the 2023 jury decision.").

2. Public Enforcement Strategies

Public enforcement actions are a different creature. This Subsection identifies three models for public enforcement cases that might be able to reform our residential real estate industry, as follows: the big case; the catalyst state case; and the piranha method.

i. The Big Case

The U.S. Department of Justice ("DOJ") filed a Statement of Interest ("SOI") as part of judicial consideration of approval for the NAR settlement. The SOI emphasized the dissimilarity between resolution of a class action antitrust suit and public enforcement, stating as follows:

> The Court's evaluation under Rule 23(e) does not require it to determine that the changes in NAR's rules included in the proposed settlement effectively remedy past violations, nor whether those changes comply with the antitrust laws. By contrast, in an antitrust enforcement action, the role of the United States differs substantially from that of private plaintiffs. *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 170 (2004) (noting the United States, "unlike a private plaintiff, must seek to obtain the relief necessary to protect the public from further anticompetitive conduct and to redress anticompetitive harm"). In such enforcement actions, a court has the power to "prevent and restrain" violations of the Sherman Act. 15 U.S.C. § 4. Such relief should "pry open to competition a market that has been closed by defendants' illegal restraints," *Ford Motor Co. v. United States*, 405 U.S. 562, 577-78 (1972) (citation omitted), and "avoid a recurrence of the violation and . . . eliminate its consequences." *Nat'l Soc. of Pro. Eng'rs v. United States*, 435 U.S. 679, 697 (1978). A court may also restrict conduct that might otherwise be lawful to "preclude the revival of the illegal practices." *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 430 (1957).
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> Thus, while the Court may ultimately find that the proposed settlement achieves important concessions in the interests of the *private* actors in this litigation and satisfies Rule 23(e), such determination does not mean that the proposed settlement effectively prevents or restrains ongoing antitrust

> violations or remedies past violations, or itself contemplates practices that fully comply with the antitrust laws.[89]

As the DOJ argues here, a public enforcement antitrust case would be a different animal than a private class case. The DOJ not only has broader remedial authority but also has a public policy focus on market structure that cannot be replicated in a class action litigation.[90] The DOJ is powerfully positioned to disrupt any reconfigured scheme. Its SOI in the NAR settlement demonstrates its understanding of and focus on this problem.[91] The authors of *Et Tu?* offer the example of conduct by NASDAQ market makers as the closest example to the type of problem presented by residential real estate steering. It was a DOJ lawsuit that resulted in "provisions intended to thwart future anticompetitive conduct."[92]

Whether the DOJ will follow its SOI with a lawsuit is anyone's guess. It has a decades-long history of dipping its toe into antitrust scrutiny of the residential real estate brokerage market and backing off.[93] More recently, the DOJ issued an investigative demand to NAR in 2018 and a second demand in 2020, withdrew the demands as part of a settlement later in 2020, then withdrew from the settlement in 2021 and issued a new demand. The latter action resulted in years of litigation that was finally decided in favor of the DOJ with all appeals exhausted in 2025.[94] The key point here is that residential real estate brokers have not resolved their antitrust problem from steering and commission splitting by entering the NAR settlement, and the

89. Statement of Interest of the United States at 3–4, Burnett v. Nat'l Ass'n of Realtors, 615 F. Supp. 3d 948 (W.D. Mo. Nov. 24, 2024) (No. 4:19-cv-00332) [hereinafter DOJ SOI], https://www.justice.gov/atr/media/1386031/dl?inline [https://perma.cc/RG4C-ZXKJ].

90. *See* Scott Hulver & Zachary Levinson, *Understanding the Role of the FTC, DOJ, and States in Challenging Anticompetitive Practices of Hospitals and Other Health Care Providers*, KFF (Aug. 7, 2023), https://www.kff.org/health-costs/understanding-the-role-of-the-ftc-doj-and-states-in-challenging-anticompetitive-practices-of-hospitals-and-other-health-care-providers [https://perma.cc/Y7C5-9HGQ] (explaining that federal government enforcement is carried out for the benefit of consumers and efficient markets).

91. DOJ SOI, *supra* note 89, at 2 (citing the summary judgment order in the *Burnett* case and stating that "[l]isting brokers, who represent sellers, effectively decide the total commission and, as a general matter, split it with buyer brokers, insulating buyer brokers from meaningful competition, foreclosing meaningful negotiations between buyer brokers and their clients, and decreasing the incentive for brokers to offer improved or lower-cost services").

92. Barry et al., *supra* note 4, at 1570.

93. *See* Rob Hahn, *DOJ, FTC & NAR: A Hundred Year War*, NOTORIOUS ROB (Aug. 29, 2022), https://notoriousrob.com/2022/08/doj-ftc-nar-a-hundred-year-war (providing a thorough and entertaining history of DOJ's enforcement work in this space and concluding that "NAR is the ancient foe of the DOJ and FTC. It has lost a few fights, but managed to stay one step ahead of the government, and kept commissions at more or less the same level in 2022 as they were in 1939.") (on file with the *Iowa Law Review Online*).

94. Nat'l Ass'n of Realtors v. United States, 97 F.4th 951, 953–56 (D.C. Cir. 2024), *cert. denied*, 145 S.Ct. 1050 (2025).

biggest threat they face is a DOJ action (now, later, or much later) claiming violations of antitrust law.[95]

State attorneys general also have the authority under both federal and state law to initiate the "big case" alleging antitrust violations that restructure a market. This can be done through a multistate case: as occurred, for example, in the multistate settlements of the 1990s tobacco litigation or the 2010s settlement resulting in the National Mortgage Settlement.[96] Or, a single state attorney general could bring such a suit, which is the possibility explored in the following Subsection.

ii. The Catalyst State

Another model is for a single state to reform its residential real estate market, or a few states to act either together or in parallel. Unlike most market problems that involve goods and services freely flowing across state lines, residential real estate involves land sales that are inherently local in nature. Not only is regulation of residential real estate brokers almost exclusively at the state level, but numerous studies, including *Et Tu?*, have found that there is a prevailing going-rate for seller and buyer commissions that varies for each state or metropolitan area.[97]

State attorneys general are especially well positioned to bring out a state-level market transformation because they typically possess authority to enforce all three standards-based laws that make steering illegal. As noted above, state attorneys general possess enforcement authority for federal antitrust law and for state antitrust statutes.[98] They are primary public

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95. Nor will the industry be able to argue the NAR settlement precludes a later public enforcement lawsuit. *See generally* Prentiss Cox, *Public Enforcement Compensation and Private Rights*, 100 MINN. L. REV. 2313 (2016) (explaining why private actions do not preclude public enforcement). The DOJ SOI argues that "[b]ecause the United States did not participate in either the underlying litigation or the proposed settlement, that settlement does not preclude any future enforcement actions by the United States, and compliance with the proposed settlement or new NAR rules implementing that settlement affords no defense to any such enforcement actions." DOJ SOI, *supra* note 89, at 4. In any case, the NAR settlement recognizes this reality and includes a provision that the terms of a judgment in any public enforcement action brought "by the United States Department of Justice, United States Federal Trade Commission, or any State Attorney General" will supersede the NAR settlement terms. NAR Settlement, *supra* note 34, ¶ 59.

96. *See The Master Settlement Agreement*, NAT'L ASS'N ATT'YS GEN., https://www.naag.org/our-work/naag-center-for-tobacco-and-public-health/the-master-settlement-agreement [https://perma.cc/YPS5-3J5X] (detailing the cooperation leading to the tobacco antitrust settlement).

97. Barry et al., *supra* note 4, at 1509–10. *See* STEPHEN BROBECK, CONSUMER FED'N AM., REAL ESTATE COMMISSION RATES IN 35 CITIES: UNIFORMITY AND VARIABILITY (2022), https://consumerfed.org/wp-content/uploads/2022/04/Real-Estate-Commission-Rates-Uniformity-Report-4-25-22.pdf [https://perma.cc/RGS9-SKK4] (outlining vast differences in real estate commission in different markets).

98. *Antitrust*, NAT'L ASS'N ATT'YS GEN., https://www.naag.org/issues/antitrust [https://perma.cc/9LP4-9SR7].

enforcers of UDAP law in almost every state.[99] A breach of fiduciary duty should be a *per se* breach of UDAP law. And even if that is not the law in a given state, state attorneys general can enforce state laws under their plenary common law authority or the *parens patriae* doctrine.[100] Attorney general enforcement in a state also might be supplemented by a combination of legislation and licensing agency rulemaking.

If the supposition of *Et Tu?* and this Response are correct, the result of eliminating steering and commission splitting should be a more efficient home selling and buying process that saves tens of millions of dollars annually for homeowners, even in a small state.[101] Because residential real estate is a local matter, a single state has an especially propitious opportunity to create a new model that spreads and thereby upends the long-entrenched, excessive costs and stagnation in the U.S. market. There are numerous examples of reforms in a single state that spread to other states and eventually led to national reforms, including the containment of foreclosure equity stripping scams in residential real estate in the 2000s.[102]

Reforming the market in this way also should make it attractive to new market entrants. Further, a business with an alternative market approach that reduces commissions but relies on breaking the model of steering and commission-splitting to survive would naturally be attracted to a state where there is the likelihood of public enforcement to protect a free market for competitors. This could lead to self-reinforcing cycle of pro-consumer market reforms.

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99. *See generally State-by-State Summaries of State UDAP Statutes*, NAT'L CONSUMER L. CTR. (2009), https://filearchive.nclc.org/udap/analysis-state-summaries.pdf [https://perma.cc/9MQV-9ULM] (showcasing role of attorney general in most states).

100. *See* Bennett Cho-Smith, Note, *State Attorneys General, You're My Only Hope: How to Fill the Enforcement Gap in Federal Consumer Protection Law with* Parens Patriae *Litigation*, 22 GEO. J.L. & PUB. POL'Y 303, 332–34 (describing how attorneys general can use the *parens patriae* doctrine for consumer protection litigation).

101. Vermont, for example, is the second smallest state with about 0.19% of the U.S. population. *List of U.S. States and Territories by Population*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_U.S._states_and_territories_by_population [https://perma.cc/X4CS-P3DP]. That would suggest more than $40 million per year in homeowner savings based on the U.S. estimate of $22 billion as the minimum amount of annual loss. *See supra* notes 22–23 and accompanying text.

102. *See* 12 U.S.C. § 5538 (granting the CFPB rulemaking authority with regard to foreclosure rescue services). *See generally* Kristin Siegesmund & Leah Weaver, *Minnesota Statutes Chapter 325N: A Model for Substantive Consumer Protection*, 33 WM. MITCHELL L. REV. 223 (2006) (discussing the origins of Chapter 325N, a MN law designed to prevent against foreclosure equity stripping scams); *Defining Predatory Lending and Equity Stripping in Minnesota*, BURNS HANSEN, https://www.patrickburnslaw.com/articles/defining-predatory-lending-and-equity-stripping-in-minnesota [https://perma.cc/8V6J-C4J2] ("In 2004, Minnesota passed one of the first laws in the country prohibiting 'equity stripping' through foreclosure rescue schemes. Over a dozen states have followed the Minnesota model by passing similar legislation.").

iii. The Piranha Model

A third option is a decentralized litigation strategy aimed at making prohibitive the cost of maintaining the illegal steering and commission-splitting scheme. A series of smaller public enforcement actions against individual real estate brokers that result in judgments for restitution to homeowners and civil penalties could raise the cost of continuing the conduct. Obtaining substantial publicity for these enforcement actions could raise public awareness and thus further increase the cost of blocking market reform. Public enforcement could be combined with a class action case for a class of homeowners in a single state in some circumstances. Even individual cases by legal aid or other consumer advocates could be coordinated to further pressure the current industry model of recreating steering with commission splitting.

Conclusion

Each year, U.S. residential real estate brokers drain tens of billions of dollars of wealth from U.S. homeowners. The unique and important research and analysis published in *Et Tu?* make a strong case that steering and commission-splitting drive the cost disparities between the U.S. market and comparable developed nations.

This Response argues that public enforcers are the entities best positioned to bring the enforcement actions needed to fundamentally reform American residential real estate markets. The extraordinary level of homeowner loss in residential real estate compared to other developed nations, combined with current law that provides the necessary authority to obtain a judicial resolution of the problem, should motivate a public enforcer—whether the DOJ or a single state attorney general—to initiate the litigation necessary to crack open this market.